Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

MARTEZ L. HENDERSON, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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QUESTION PRESENTED

WHETHER PETITIONER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION AT A CUSTODIAL INTERROGATION WAS VIOLATED WHEN MILITARY CRIMINAL INVESTIGATORS REINITIATED INTERROGATION AFTER PETITIONER UNEQUIVOCALLY REQUESTED A HALT IN QUESTIONING.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

MARTEZ L. HENDERSON, PRIVATE FIRST CLASS,
United States Army, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

The petitioner, Martez L. Henderson, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 52 M.J. 14 (1999) (Appendix A). The decision of the United States Army Court of Criminal Appeals on Reconsideration is reported at 48 M.J. 616. (Appendix B). The first decision of the United States Army Court of Criminal Appeals is unpublished. (Appendix C).

JURISDICTION

The judgment for the Court of Appeals for the Armed Forces was entered on September 27, 1999 (Appendix D). The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1259 (3); the United States Court of Appeals for the Armed Forces having reviewed this case pursuant to Uniform Code of Military Justice Article 67(a)(3), 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves:

1. The Fifth Amendment to the United States Constitution which provides:

> No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Uniform Code of Military Justice Article 31, 10 U.S.C § 831, which provides in pertinent part:

> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
>
> (b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a court-martial.

STATEMENT OF THE CASE

Procedural History:

On May 31, July 14, and July 18-21, 1995, Private First Class Martez L. Henderson was tried by a general court-martial composed of officer and enlisted members at Mannheim and Bad Kreuznach, Germany. Contrary to his pleas, Private Henderson was found guilty of premeditated murder and assault, in violation of the Uniform Code of Military Justice, articles 118 and 128, 10 U.S.C. §§ 918 and 928 (1988). Private Henderson was sentenced to confinement for life, reduction to Private El, forfeiture of $300.00 pay per month for fourteen months, and a dishonorable discharge. The convening authority disapproved the finding of guilty to premeditated murder, found Private Henderson guilty of unpremeditated murder and reduced Private Henderson's sentence to confinement to sixty years. The convening authority otherwise approved the findings and sentence.

On November 18, 1997, the Army Court of Criminal Appeals set aside the finding of guilty to unpremeditated murder, affirmed a finding of voluntary manslaughter, set aside the sentence and ordered a sentence rehearing. (Appendix C). After the government requested reconsideration, the Army court withdrew its earlier decision, and on April 30, 1998 affirmed the conviction for unpremeditated murder. (Appendix B).

On February 3, 1999, the United States Court of Appeals for the Armed Forces granted review on four issues, including:

> WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT'S RIGHTS BY DENYING APPELLANT'S MOTION TO SUPPRESS AND RECEIVING APPELLANT'S INVOLUNTARY STATEMENTS INTO EVIDENCE AND SUCH ERROR IS NOT HARMLESS BEYOND A REASONABLE DOUBT.

The Court of Appeals for the Armed Forces rendered its opinion on September 27, 1999 (Appendix A), affirming the findings and sentence of the United States Army Court of Criminal Appeals.

Statement of Facts:

On the night of February 23, 1995, Mr. Thomas Kreiz, a German citizen, and some friends and family members approached a taxi stand in Bad Kreuznach, Germany. Kreiz and his companions had been drinking. (R. at 294, 316-17).[1] Kreiz and his companions decided that they did not want to wait for a taxi, so they "cut" in front of the others waiting in line. Petitioner and two friends were among those waiting in line. (R. at 392). Kreiz seized the next taxi, angering petitioner and his two companions. One of petitioner's companions, Michael Krakowiki, verbally protested and grabbed the cab door, preventing Kreiz from closing it. (R. at 276-77, 441-42). Krakowiki kicked Kreiz, and Kreiz exited the taxi and attempted to hit Krakowiki. (R. at 276-77). Krakowiki ran, so Kreiz chased Krakowiki into a nearby alley, and petitioner and his other companion and two of Kreiz's companions followed behind. (R. at 296, 442).[2]

By the time Kreiz's two companions caught up to the others, Kreiz was lying on the ground with petitioner standing near him. (R. at 297-307). Kreiz was injured and kneeling on the ground. (R. at 297-98). One of Kreitz's companions, Massaro, assisted Kreitz to his feet and led him out of the alley. Petitioner and his friends followed. While Massaro was assisting Kreitz out of the alley, Massaro felt a sharp pain in his back. Massaro turned around and saw

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[1] Mr. Kreiz' autopsy indicated that he was extremely intoxicated and also smoked hashish that night. A piece of hashish the size of a pigeon egg was found in Mr. Kreiz's pocket. Mr. Kreiz also had a criminal record, having the German equivalent of a conviction for assault and two convictions for violating Germany's narcotics laws. Prosecution Exhibit 34.
[2] Petitioner did not take part in the affray at the taxi stand. (R. at 270-78, 292-300, 341-365).

petitioner standing three to six feet away. (R. at 297, 300-02, 345-47). However, Massaro did not see a knife. (R. at 302).

Kreiz was stabbed eight times, one of which was fatal. (R. at 501-02). Four other wounds were potentially fatal. (R. at 502-06).

Petitioner and his companions fled the scene. Petitioner was finally apprehended by a German police officer and escorted to the German police building. Petitioner was interrogated at 12:30 a.m. on February 24th by German authorities. United States Army Criminal Investigation Command (CID) Special Agent (SA) Ernesto Panaligan, was present during the interrogation. After informing petitioner of his rights pursuant to German law and informing him, pursuant to the Article 31, Uniform Code of Military Justice, of his right to silence and his right to counsel, and receiving a waiver of those rights, the German police and CID SA Panaligan interrogated petitioner for one and one-half hours. During this interrogation petitioner denied any involvement with Kreiz's death.

At 2:00 a.m., petitioner "requested that the interview be terminated because he was tired and he wanted to continue the following morning." (R. at 40). SA Panaligan, the CID agent present at the interrogation, asked the German police if he could talk to petitioner alone. The Germans agreed.[3]

SA Panaligan reinitiated the interrogation of petitioner. He did not remind petitioner of his rights, but told petitioner that "I am a representative of the US Government" and "if he has nothing to do with this, there's nothing to worry

---

[3] SA Panaligan claimed he reinitiated the interrogation of petitioner:

> [b]ecause I was thinking that it could be a mistaken identity because the initial briefing I got from Investigator Hoffinan - - there were three black males involved and now we have only one black male in custody, and he kept saying about Mackland. I raised that issue with Investigator Ebert - that Mackland could be the key to the whole situation - and I was thinking that PFC Henderson might not be involved because, if there were three males involved and there was only one in custody, where are the other two.
>
> (R. at 43.)

about, just tell the truth" (R. at 40), and that SA Panaligan was "there to help him." (R. at 41). Petitioner asked SA Panaligan what he would get if convicted and what was the possible punishment. SA Panaligan told petitioner that the punishment was up to the court to decide. (R. at 41). Petitioner then told SA Panaligan, "well, what I told you before during the interview, is not really what happened," and that he wanted to tell the truth. (R. at 42).

SA Panaligan left the room to retrieve Agent John Kampa, SA Panaligan's supervisor. Agent Kampa followed SA Panaligan into the interrogation room. Agent Kampa asked petitioner, "I believe you have something to say." (R. at 45). Petitioner responded that what happened was not supposed to happen. Agent Kampa again asked if petitioner had something to say. Petitioner responded, "I want a lawyer."

Agent Kampa paused, and petitioner told Agent Kampa he wanted to talk, but he wanted a lawyer. (R. at 46). Agent Kampa told petitioner, "we can't talk to you if you want to talk to a lawyer first." (R. at 83). Petitioner then asked if he could have a lawyer and make a statement. Agent Kampa replied that he could not have both. (R. at 46). Petitioner, rebuffed in his request, said, "well I want to talk now and I want a lawyer tomorrow morning. " (R. at *id*). Petitioner then admitted to stabbing Kreiz in self defense.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Armed Forces (CAAF) misapplied this Court's precedents in *Miranda v. Arizona*, *Michigan v. Mosely and Edwards v. Arizona*, denying military service members of their constitutional right to remain silent in custodial interrogations.

Petitioner's criminal conduct was established solely by the statement from appellant, obtained only through violating petitioner's Fifth Amendment privilege. The government violated petitioner's privilege by continuing to question

petitioner when petitioner asked to halt questioning; by failing to readvise petitioner of his rights; and by continuing to question petitioner after he had invoked his right to silence.

WHEN A SUSPECT REQUESTS TO CEASE INTERROGATION THE GOVERNMENT CANNOT IMMEDIATELY REINITIATE INTERROGATION.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court recognized the coercive nature of custodial interrogations, and required that a person in custody be informed in clear and unequivocal terms that he has the right to remain silent.

> [I]f the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries ....

384 U.S. at 444 - 445.

In *Michigan v. Mosely*, 423 U.S. 96 (1975), this Court explained how "a reasonable and faithful" interpretation of *Miranda* would apply in a situation where the person requests a cessation in questioning.

> The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." (citing *Miranda*, 384 U.S. at 474). Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts

> the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after a person in custody has decided to remain silent depends under *Miranda* on whether his "right to cut off questioning" was "scrupulously honored."

423 U.S. at 103 - 04.

In *Mosely*, this Court reviewed the circumstances leading to the questioning of Mosely and found that Mosely's right to "cut off questioning" was respected. This Court focused on readvisement, timing and the parties involvement in questioning. Mosely was fully advised of his rights, waived them, and was questioned by one officer about robberies. Mosely said he did not want to discuss the robberies. The officer ceased questioning. After a two hour interval, another officer advised Mosely of his rights and questioned him on an unrelated robbery and murder. This Court found that the subsequent questioning did not undercut Mosely's previous decision to not answer the first detective's questions. *Id.* at 326-27.

The CAAF did not cite *Mosely*, but relied on *Edwards v. Arizona*, 451 U.S. 477 (1981) in denying petitioner's claim. However, *Edwards* has no applicability to petitioner's invocation to silence, because the invocation is clear. Edwards was charged with robbery, burglary, and murder. He was informed of his rights pursuant to *Miranda*, and denied any criminal conduct. Edwards then told police he wanted to make a deal, but said he "want[ed] an attorney before making a deal." Police ceased questioning immediately. The next morning, two other police officers attempted to question Edwards. Edwards told the jail guard that he did not want to talk, but was told that he "had to." Edwards subsequently confessed to the police officers. This Court ruled the confession inadmissible.

> [W]e now hold that when an accused had invoked his right to have counsel present

> during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.
>
> We further hold that an accused, . . ., having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with police.

Id. at 484 - 85.

In this case, petitioner's right to remain silent was clearly and unequivocally enunciated: petitioner terminated the interview until the following morning. SA Panaligan did not scrupulously honor petitioner's request to remain silent. Instead, a moment after he reentered the room, he told petitioner that he was "a government agent" there to help, and encouraged petitioner to "just tell the truth." SA Panaligan did not readvise petitioner of his rights, and the reinitiation took place only moments after petitioner invoked his right to remain silent. SA Panaligan was fully aware that petitioner had invoked because he took part in the original interrogation. Furthermore, the questions, unlike those in *Mosely*, involved the same crime. The immediate reinitiation of the interrogation by SA Panaligan undercut petitioner's earlier invocation. Petitioner's attempt to control the time at which questioning was to occur was overborne by SA Panaligan's actions.

The Court of Appeals for the Armed Forces (CAAF) rejected petitioner's claim, apparently misinterpreting the applicable law and rejecting this Court's analysis in both *Miranda*, *Mosely*, and *Edwards*. The CAAF stated:

> We are not convinced that *Edwards* applies in

> a situation involving interrogation conducted by a foreign Government. In any event, we find no violation of *Edwards* in SA Panaligan's continued encouragement of [petitioner] to speak the truth. The record before us shows no unequivocal assertion by appellant of his right to counsel or silence, which is required to invoke the *Miranda -Edwards* [footnote omitted] bright-line rule against further police interrogation or its functional equivalent. [citation omitted]. Here, he simply indicated that he was tired of talking and wanted to continue the next day. Accordingly, this legal claim based on *Edwards* is without merit.

52 M.J. 14, 18 (1999). (emphasis added).

The CAAF confused the right to counsel, discussed in *Edwards*, and the right to silence, discussed in *Mosely*, and arrived at the extraordinary conclusion that petitioner's statement that he "was tired of talking and wanted to continue the next day" was equivocal. However, it is anything but equivocal.

The CAAF also determined that petitioner's statement was voluntary and therefore admissible. However, this Court in *Mosely* rejected such an approach. Instead, the question to be answered first is whether the government met its burden in showing that it complied with the proper procedures before determining whether the statement was made voluntarily. *United States v. Barone*, 968 F.2d 1378, 1383-84 (1st Cir. 1992).

Petitioner unequivocally invoked his right to silence. The original Army investigating officer reinitiated questioning immediately after the invocation, and questioned petitioner about the same acts as was the focus of the earlier questioning. The government agent violated the safeguards established by this Court in *Miranda v. Arizona* and *Michigan v. Mosely*.

CONCLUSION

The Court of Appeals for the Armed Forces misapplied this Court's holdings on self-incrimination. As a result, soldiers who defend this country's constitutional rights are denied those rights when accused of criminal conduct. In this case, the petitioner unequivocally invoked his right to silence. Police officials did not scrupulously honor petitioner's request to remain silent. Petitioner's right to remain silent was violated, and a statement taken in violation of this right was admitted into evidence against petitioner. Petitioner's right against self-incrimination, as well as that of other service members, must be protected. For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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December 1999

APPENDIX A

IN THE CASE OF
UNITED STATES, Appellee,

v.

Martez L. HENDERSON, Private First Class
U.S. Army, Appellant

No. 98-0847.

Crim.App. No. 9501435.

United States Court of Appeals for the Armed Forces.

Argued May 12, 1999.

Decided September 27, 1999.

SULLIVAN, J., delivered the opinion of the Court, in which COX, C.J., and CRAWFORD, GIERKE, AND EFFRON, J.J., joined.

Counsel

For Appellant: *Major Leslie A. Nepper (argued); Lieutenant Colonel Adele H. Odegard and Major Michael E. Hatch,* USAR (on brief); *Colonel John T. Phelps, II, and Major Holly S. G. Coffey.*

For Appellee: *Major Virginia G. Beakes,* USAR (argued); *Colonel Russell S. Estey, Lieutenant Colonel Eugene R. Milhizer, and Major Patricia A. Ham* (on brief).

Military Judge: Craig S. Schwender

Opinion of the Court

SULLIVAN, Judge:

Appellant was tried by a general court-martial composed of officer and enlisted members during the summer of 1995 at Mannheim and Bad Kreuznach, Germany. Contrary to his pleas, he was found guilty of the premeditated murder of Thomas Kreiz and the aggravated assault of Thomas Kreiz and Mario Massaro, in violation of Articles 118(l) and 128(b)(1) and (2), Uniform Code of Military Justice, 10 USC §§ 918(l) and 928(b)(1) and (2). On July 21, 1995, the members sentenced appellant to a dishonorable discharge, confinement for life, forfeiture of $300 pay per month for 14 months, reduction to pay grade E-l, and a reprimand.

On November 24, 1995, the convening authority reduced the finding of guilty of premeditated murder to a finding of guilty of unpremeditated murder in violation of Article 118(2). He also approved only so much of the adjudged sentence as provided for a dishonorable discharge, confinement for 60 years, forfeiture of $300 pay per month for 14 months, and reduction to E-1.

On November 18, 1997, a panel of the Court of Criminal Appeals further reduced the finding of guilty of unpremeditated murder to voluntary manslaughter, in violation of Article 119(a), UCMJ, 10 USC § 919(a), set aside the sentence, and authorized a rehearing on sentence. On January 20, 1998, the Government requested reconsideration by the panel or by the court *en banc*. On February 19, 1998, *en banc* reconsideration was denied. However, the panel agreed to reconsider its decision. On April 30, 1998, it issued a second decision which set aside its prior decision, affirmed findings of guilty to unpremeditated murder and the other offenses, and affirmed the sentence. 48 M.J. 616 (1998).

On February 3, 1999, this Court granted review on the

following issues of law:

I. WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT'S RIGHTS BY DENYING APPELLANT'S MOTION TO SUPPRESS AND RECEIVING APPELLANT'S INVOLUNTARY STATEMENTS INTO EVIDENCE AND SUCH ERROR IS NOT HARMLESS BEYOND A REASONABLE DOUBT.

II. WHETHER THE EVIDENCE IS LEGALLY INSUFFICIENT TO FIND APPELLANT GUILTY OF UNPREMEDITATED MURDER.

III. WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED WHEN IT REVERSED ITS PREVIOUS FINDING THAT APPELLANT UNLAWFULLY KILLED THOMAS KREIZ IN THE HEAT OF PASSION CAUSED BY ADEQUATE PROVOCATION, IN VIOLATION OF ARTICLE 119(a), UCMJ.

IV. WHETHER THE ARMY COURT SIGNIFICANTLY ALTERED THE BURDEN OF PROOF NECESSARY TO PROVE THE OFFENSE OF UNPREMEDITATED MURDER.

We hold that the finding of guilty to unpremeditated murder should be affirmed.

The facts in this case as found by the Court of Criminal Appeals are fully reported in its decision of April 30, 1998. In pertinent part, it said:

> The death of Mr. Kreiz and the wounding of Mr. Massaro resulted from a dispute over a taxicab that occurred at the bahnhof (train station) in Bad Kreuznach, Germany, Fasching night, 23 February 1995. Several hours before midnight on that date, after an afternoon and evening of dining and drinking, Mr. Kreiz and his party of five, composed of himself, his mother, two additional female friends, Ms. Iris Porth and Ms. Annabelle Kurz, and

Mr. Massaro, apparently decided not to wait their turn in line at the bahnhof taxicab stand and entered the next taxi that arrived. Appellant, who is black, and his party of three, composed of himself, another black soldier named Coleman, and a Caucasian German national named Krakowiki, were among several persons who took issue with Mr. Kreiz's going to the head of the line.

Krakowiki verbally protested and physically held the front passenger door of the taxi, preventing Mr. Kreiz from closing it. When Krakowiki assaulted Mr. Kreiz by kicking him once on the thigh, Mr. Kreiz exited the cab and swung his fist at Krakowiki. Krakowiki was not hit, but backed away and ultimately ran towards, and into, Schaefergasse alley. Mr. Kreiz gave chase. His mother and Mr. Massaro yelled at him to "Stop. Leave him alone. Let's go home. It's late." Appellant, Coleman, Mr. Massaro, and Ms. Porth all followed behind at various intervals and in some undetermined order.

However, by the time Mr. Massaro and Ms. Porth arrived at the scene, they saw Mr. Kreiz down on the ground with only appellant standing in very close proximity to him. It was obvious that Mr. Kreiz had been injured. Mr. Massaro got in between appellant and Mr. Kreiz. Unbeknownst to both Ms. Porth and Mr. Massaro, appellant had stabbed/cut Mr. Kreiz eight times, five of which were penetrating wounds. Mr. Massaro and Ms. Porth lifted Mr. Kreiz to his feet, and while supporting him between them, assisted him out of the alley and back to the bahnhof. As they were doing so, they were followed by men who were taunting them. It was at this time that Mr. Massaro was struck in the lower right portion of his back. Although he did not realize at the time that

he had been stabbed, this became apparent shortly thereafter. When he was struck, he turned and saw appellant standing about three to six feet behind him, but he never saw a knife. After Mr. Kreiz was dragged/carried back to the front of the bahnhof by his two friends, he collapsed on the ground. While lying on the ground mortally wounded, he was kicked in the head and side by two individuals identified by witnesses as various combinations of appellant, Krakowiki, and Coleman.

Witnesses to the violent altercation notified the German police at the bahnhof. When the police responded, appellant and his companions fled the scene with the police in pursuit. After a lengthy foot chase, appellant was cornered and apprehended. He was taken into German police custody and transported back to the bahnhof where he was identified by the decedent's mother and Ms. Porth as one of Mr. Kreiz's assailants. He was then taken to the Bad Kreuznach main police station where he was detained for questioning.

After being advised of his rights against self-incrimination under both German law and Article 31, UCMJ, appellant waived those rights and, beginning at about 12:30 a.m. on the morning of 24 February 1995, was interrogated for approximately one and one-half hours by German police. Appellant steadfastly denied any involvement in the incident leading up to the death of Mr. Kreiz. At about 2:00 a.m., appellant indicated that he was tired and asked to continue the interview the next morning. The German police immediately complied with appellant's request and ceased all questioning. The occurrences that are the basis for appellant's sole assignment of error commenced at this time.

Special Agent Ernesto Panaligan, who was

present as an observer, asked the head German investigator if he could talk to appellant in private and was permitted to do so. Special Agent Panaligan told appellant that "if he had nothing to do with the murder, he had nothing to worry about" and "that he should just tell the truth." Special Agent Panaligan also stated that he "was a representative of the U.S. Government and was present to help the appellant." Appellant did not respond immediately, but as SA Panaligan was about to leave the room, appellant waved him back into the room and asked about punishments if he were convicted. Special Agent Panaligan answered that punishment was up to the courts. Appellant then admitted that what he had told the German investigators was "not really what happened" and that he "wanted to tell the truth now."

Special Agent Panaligan left the room and returned with his supervisor, CID SA John Kampa. Upon entering the room, SA Kampa said to appellant, "I understand you have something to say." Appellant replied that he did, but that "he needed a lawyer." Recognizing that appellant had invoked his right to counsel, SA Kampa indicated that he could not talk to appellant if the appellant wanted to talk to a lawyer first and started to leave the room. Appellant motioned him back and asked if he could make a statement at that time and talk to a lawyer "in the morning. " Special Agent Kampa initially responded that that could not be done, but when appellant stated, "What? I can't have both?", SA Kampa inquired, "Do you want to talk now and you want a lawyer in the morning?" Appellant responded affirmatively.

Thereafter, in the presence of German police and CID agents, the appellant admitted to stabbing

> *Mr. Kreiz three or four times, purportedly in self-defense, as Mr. Kreiz was beating the appellant.* Appellant described his fear of great bodily injury and asserted that he "jabbed" Mr. Kreiz with his pocketknife in the side and back to get Mr. Kreiz to stop pummeling him.[10/] This admission by appellant, that he had stabbed the decedent in the midst of an affray, was the only direct evidence linking appellant to the stabbing death of Mr. Kreiz. There was circumstantial evidence in the form of the victim's blood on the front of appellant's clothing, however, no witness saw appellant stab Mr. Kreiz, no knife was ever recovered, and the victim's blood was also found on Krakowiki's clothing.

48 MJ at 617-19 (footnotes omitted except where noted) (emphasis added).

[10/] Appellant also stated that he defended himself when Mr. Kreiz knocked him to the ground and struck him repeatedly in the face. According to appellant, when he was able to pull down Mr. Kreiz and roll over on top of him, Mr. Massaro joined in the melee, kicking appellant in the stomach and hitting him in the face. *Appellant finally pulled out his pocketknife to defend himself against both Mr. Kreiz and Mr. Massaro.* We have found that Mr. Massaro's only role in Schaefergasse alley was to separate appellant from Mr. Kreiz after Mr. Kreiz had been injured by appellant. Consequently, we find the appellant's statement to law enforcement authorities concerning the circumstances surrounding the stabbing to be incredible.

I.

The first issue granted review asks whether the trial judge erred in denying appellant's motion to suppress his pretrial statement to Agent Kampa that he stabbed Mr. Kreiz with his pocketknife during the affray in the alley. The Court of Criminal Appeals points out that this was "the only direct evidence linking appellant to the stabbing death of Mr. Kreiz," although circumstantial evidence on this point existed in the record. *Id.* at 619. Appellant submits

> that a consideration of the totality of the circumstances, as called for by *[United States v.] Bubonics*, [40 MJ 734 (NMCMR 1994)], reveals that all statements obtained and received into evidence against him at trial were involuntary in that they were obtained in violation of UCMJ art. 31, in violation of the self-incrimination privilege, in violation of the due process clause of the Fifth Amendment, and through the use of coercion, unlawful influence, or unlawful inducement.

Final Brief at 12.

The first question we will address is whether Special Agent (SA) Panaligan's earlier conversation with appellant after he terminated his interview with German police investigators violated *Edwards v. Arizona*, 451 U.S. 477 (1981). *Edwards* holds that a suspect in custody, who states his intention to exercise his right to counsel or silence, may not be interrogated by police until his lawyer is present or until he reinitiates discussions with police about the crime. *See Enoch v. Gramley*, 70 F.3d 1490, 1499-1500 (7th Cir. 1995). Appellant argues that SA Panaligan's advice to tell the truth if he was innocent was interrogation which violated the *Edwards* bright-line rule and tainted his later statement to SA Kampa admitting his stabbing of Mr. Kreiz. *See Collazo v. Estelle*, 940 F.2d 411, 417-18 (9th Cir. 1991). We disagree.

We note that the record in this case shows that appellant was arrested by German police and brought to a

German police building. Both German and American authorities advised him of his rights, he waived those rights, and German police conducted his questioning. He then admitted only to being a witness to the fight. After approximately 2 hours, appellant said that he was tired and indicated that he wanted to continue the questioning in the morning.

We are not convinced that *Edwards* applies in a situation involving interrogation conducted by a foreign Government. In any event, we find no violation of *Edwards* in SA Panaligan's continued encouragement of appellant to speak the truth. The record before us shows no unequivocal assertion by appellant of his right to counsel or silence, which is required to invoke the Miranda[1]-Edwards bright-line rule against further police interrogation or its functional equivalent. *See Davis v. United States*, 512 U.S. 452 (1992). Here, he simply indicated that he was tired of talking and wanted to continue the next day. Accordingly, this legal claim based on *Edwards* is without merit.

The next question we will address is whether SA Kampa's subsequent questioning of appellant violated *Edwards*. Appellant asserts that he "clearly and unequivocally requested a lawyer" after his conversation with SA Panaligan but before his admissions to Agent Kampa. The record shows, however, that appellant stated that he both wanted to talk to police "and" he wanted a lawyer. The record also shows that SA Kampa refused this request but acceded to appellant's second request to talk to them at that time and to see a lawyer in the morning. In our view, this was also a situation where appellant did not unequivocally exercise his right to counsel, and his actions were legally insufficient to invoke the protections of *Miranda and Edwards. See Davis v. United States, supra.*

The final question we will address regarding Issue I is whether all the circumstances of this case together show that

[1]*Miranda* v. *Arizona*, 384 U.S. 436 (1966).

appellant's will was overbome and his inculpatory admissions were involuntary. See *United States v. Bubonics*, 45 MJ 93-94 (1996). Appellant cites two Court of Criminal Appeals cases generally identifying factors pertaining to a voluntariness inquiry. *See United States v. Sojfer*, 47 MJ 425, 429-30 (1998)(our Court discussing the same factors). He then notes his purported 3-hour interrogation and the ambiguous role of Special Agents Panaligan and Kampa as representatives of the United States Government who were purportedly there to help him.

We review *de novo* the question of the voluntariness of a *Fulminante* confession. *See Bubonics, supra* at 94; *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991). We agree with the appellate court below, however, that appellant's incriminatory admissions were entirely voluntary. The record shows that he couched these admissions in his exculpatory story of self-defense to military authorities in the hopes of avoiding his problems with the German Government. In these circumstances, we see no involuntariness. *See United States v. Washington*, 46 MJ 477, 482 (1997) (confession voluntary where record shows appellant tried to talk himself out of trouble).

II

Appellant next complains that the evidence of record is legally insufficient to support his conviction for unpremeditated murder. He argues that the prosecution introduced no evidence that he intended to kill or inflict great bodily harm on the victim, Mr. Kreiz. He further argues that the prosecution failed to prove that appellant did not act in the heat of passion due to adequate provocation. We will not relitigate this case at the appellate level, but instead limit ourselves to the question whether evidence was admitted in this case which would permit a reasonable person to find appellant guilty of unpremeditated murder. *See United States v. Pabon*, 42 MJ 404, 405 (1995), citing *Jackson v.*

Virginia, 443 U.S. 307, 319 (1979).

Initially, we note that appellant, in a pretrial statement, admitted stabbing Mr. Kreiz numerous times. Other evidence was admitted that Mr. Kreiz was stabbed eight times, one time in the heart and four other times in life-threatening locations, and Mr. Massaro was stabbed in the back as he was attempting to withdraw a badly wounded Mr. Kreiz from the alley. Evidence was also admitted that appellant kicked Mr. Kreiz in the head while he was lying wounded in his mother's arms outside the alley.

Proof that a person used a knife and that a death resulted therefrom has long been considered proof of an intent to kill or cause great bodily harm. *See United States v. Jackson*, 6 USCMA 193, 203, 19 CMR 319, 329 (1955); *United States v. Holsey*, 2 USCMA 554, 556-57, 10 CMR 52, 54-55 (1953). Moreover, proof of numerous wounds in lethal locations also reasonably suggests an intent to kill. *See United States v. Rodwell*, 20 MJ 264 (CMA 1985). Finally, we note that proof that appellant continued his assault on the victim, even while he lay helpless in the arms of others, surely would suggest to a reasonable person an intent to kill or inflict great bodily harm. *See United States v. Varraso*, 21 MJ 129, 134 (CMA 1985).

Admittedly, appellant's version of the events that evening, as reflected in his pretrial statement admitted as evidence in this case, is different. He basically asserts that he was being beaten by two Germans and struck out wildly with his pocketknife in fear and desperation in an effort to protect himself (heat of passion due to adequate provocation). The prosecution, however, was not required to introduce direct evidence contradicting the defense's evidence. It could and did introduce evidence relevant to appellant's credibility, i.e., his flight from the scene of the crime and his smashing of his own face on his arrest. *See United States v. Williams*, 21 MJ 360, 362 (CMA 1986). Moreover, it could and did introduce evidence, which circumstantially contradicted

appellant's version of the events that night, i.e., testimony that appellant followed the victim and Krakowiki into the alley. *See generally United States v. Maxwell*, 38 MJ 148, 150-51 (CMA 1993) (the Government may meet its burden of proof with direct or circumstantial evidence). Viewing the record as a whole, we find that it contains legally sufficient evidence to support appellant's conviction for unpremeditated murder. *Cf. United States v. Cauley*, 45 MJ 353, 356 (1996) (we are not limited to appellant's narrow view of record on issue of lack of consent in rape case).

III

The third issue before us is whether the panel of the Court of Criminal Appeals which decided appellant's case erred when it reversed itself and affirmed a finding of guilty to unpremeditated murder. In an earlier panel decision, it had set aside appellant's approved finding of guilty of unpremeditated murder and affirmed a finding of guilty to voluntary manslaughter. Before that, as noted above, appellant had been found guilty of premeditated murder, but the convening authority subsequently reduced this finding of guilty to unpremeditated murder.

Appellant argues that the panel of judges which set aside the decision of November 18, 1997, did so in violation of Article 66(a), UCMJ, 10 USC § 866(a), which states in pertinent part:

> Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). *Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules.*

(Emphasis added.) Appellant contends that the panel's earlier decision must stand unless it is set aside by the Court of Criminal Appeals sitting *en banc*. We disagree. *See generally United States v. Boudreaux*, 35 MJ 291, 296-97 (CMA 1992) (Sullivan, C.J., concurring in the result).

The plain language of the statute provides that "[a]ny decision of a panel may be reconsidered by the court sitting as a whole....." (Emphasis added.) It does not state that any decision of a panel *must* be reconsidered by the court sitting as a whole. We presume that Congress is capable of saying what it means, and additional interpretation on our part, at least in this matter, is unnecessary. *See generally Richardson v. United States*, 119 S.Ct. 1707, 1710 (1999); *United States v. Wells*, 519 U.S. 482, 490-91 (1997).

In addition, subsections (a) and (f) of Article 66 expressly authorize the uniform rules of procedure prescribed by the Judge Advocates General. 44 MJ LXIII (effective May 1, 1996). Reconsideration of a decision by a Court of Criminal Appeals is provided for without regard to whether it is sitting as a panel or as a whole. *See* Rules 19 and 4; *cf.* Rule 17 *(en banc* proceedings). Finally, nothing in the legislative history of this codal provision has been called to our attention which expressly states that Congress intended to bar reconsideration by a panel. *See generally United States v. Solis*, 46 MJ 31, 33 (1997).

Finally, when Article 66 was first enacted, it directed each Judge Advocate General to "constitute in his office one or more boards of review." Each board of review was a separate entity. There was no provision for *en banc* proceedings. On several occasions, our Court recognized the inherent authority of a board of review to reconsider its own decisions. *See, e.g., United States v. Sparks*, 5 USCMA 453, 18 CMR 77 (1955); *United States v. Corbin*, 3 USCMA 99, 11 CMR 99 (1953); *United States v. Reeves*, 1 USCMA 388, 3 CMR 122 (1952). In *Reeves*, our Court stated that "boards of review must clothe themselves with some of the powers

inherent in courts," including "the right to correct clerical errors, inadvertently entered decisions, and those decisions which are clearly wrong as a matter of law." *Id.* at 390-91, 3 CMR at 124-25.

When the Military Justice Act of 1968 replaced the boards of review with Courts of Military Review, Article 66 was amended to direct each Judge Advocate General to "establish a court of Military Review which shall be composed of one or more panels." Article 66 further provided that "the court may sit in panels or as a whole." 82 Stat. 1335. In *United States v. Chilcote*, 20 USCMA 283, 286, 43 CMR 123, 126 (1971), our Court reviewed the legislative history of Article 66 and concluded that Congress intended to replace the boards of review with "a single appellate body for the review of court-martial cases within each service." *Chilcote* held that Article 66 did not permit *en banc* reconsideration of a panel decision; it did not address the previously recognized authority of panels to reconsider their own decisions.

In the Military Justice Act of 1983, Article 66 was amended again to specifically overrule the *Chilcote* decision by adding the following sentence: "Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules." 97 Stat. 1402. *See United States v. Flowers*, 26 MJ 463, 464-65 (CMA 1988) (setting out legislative history).

The 1983 amendment relied on by appellant addressed only the question whether a majority of the court sitting *en banc* could reconsider a panel decision. It did not overrule our Court's earlier decisions recognizing a panel's inherent authority to reconsider its own decisions.

IV

Appellant finally argues that the Court of Criminal Appeals erred in its second decision in this case by erroneously failing to require the prosecution to disprove

that he acted in the heat of passion caused by adequate provocation. *See* Art. 119(a); para. 44c(l), Part IV, Manual for Courts-Martial, United States (1995 ed.).[2] *See generally Mullaney v. Wilbur*, 421 U.S. 684 (1975). He implies that the appellate court erred in this regard because it accepted the Govemment's reconsideration argument that insufficient evidence of adequate provocation was admitted in this case. *See United States v. Maxie*, 9 USCMA 156, 25 CMR 418 (1958); *United States v. Roston*, 986 F.2d 1287, 1290 (9th Cir. 1993). We reject appellant's "failure to alter the burden of proof" argument.

The Government, indeed, did argue that the burden to disprove heat of passion based on adequate provocation never shifted to the prosecution. It particularly argued that, "[iln the instant case, the Army Court's factual determinations and the evidence in the record clearly establish that there is absolutely no evidence of adequate provocation." Moreover, it has continued to argue that its only burden was to "prove[] beyond a reasonable doubt that appellant intended to kill Mr. Kreiz." Answer to Final Brief at 54.

Turning to the appellate court's second opinion in this case, however, we are not persuaded that it accepted the Government's argument on this point. Its opinion certainly does not state that the prosecution had no burden to disprove heat of passion and adequate provocation. Instead, it said:

> In resolving legal sufficiency, this court is bound to "draw every reasonable inference from the evidence of record in favor of the prosecution," that the evidence establishes beyond a reasonable doubt that: (1) Thomas Kreiz is dead, (2) his death resulted from appellant's act of stabbing him with a knife, (3) the killing was unlawful, and (4) appellant, at the time of the killing, had the intent to kill or

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[2]This provision is unchanged in the 1998 Manual.

> inflict great bodily harm. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); Manual for Courts-Martial, United States (1995 ed.), Part IV, para. 43b(2) [hereinafter MCM]. The evidence meets this standard. *For factual sufficiency, the test is whether, after weighing the evidence of trial and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt.* UCMJ, art. 66(c); *United States v. Turner*, 25 MJ 324, 325 (CMA 1987). *We have no difficulty concluding that the evidence establishes each of the elements of proof beyond a reasonable doubt.* We find that the evidence of record supports the conclusion of the members that the appellant is not entitled to the defense of self-defense. *See* RCM 916(e)(1). *Nor was the appellant provoked to such an extent that, in the heat of sudden passion caused by adequate provocation, a fatal blow was struck before self-control could return. See* MCM, Part IV, para. 44c(l)(a). *We also find that any provocation offered by Mr. Kreiz himself was insufficient to excite uncontrollable passion in a reasonable person.*

48 MJ at 620 (footnote omitted) (emphasis added).

In construing this language, we note that the members of appellant's court-martial were properly instructed that adequate provocation and heat of passion were factual issues in this case, upon which the prosecution carried the burden of proof. These circumstances distinguish appellant's case from *Maxie* and *Roston*, where it was held that evidence in the record was not sufficient to warrant the trial judge giving an instruction on manslaughter. Moreover, the service court's opinion does not purport to establish a rule of law that fisticuffs are never adequate provocation for the use of a knife. *Cf. Maxie, supra* at 161, 25 CMR at 423 ("Insulting or

abusive words or gestures, taunts, a slight blow with the hand or fist are not, standing alone, considered adequate provocation."). Instead, expressly relying on its Article 66(c) factfinding powers, the service appellate court found that the provocation itself was insufficient. *See Mullaney*, 421 U.S. at 702. While use of the word "insufficient" might suggest an evidentiary insufficiency holding, the lower court's opinion, viewed in its entirety, clearly indicated a factual finding of inadequate provocation. *Cf. United States v. Saulsberry*, 47 MJ 493, 495 (1998); *see generally* para. 44c(l)(b), Part IV, Manual, *supra* ("The provocation must be adequate to excite uncontrollable passion in a reasonable person[.]").

The decision of the United States Army Court of Criminal Appeals is affirmed.

APPENDIX B

UNITED STATES ARMY COURT
OF CRIMINAL APPEALS

Before

EDWARDS, KAPLAN, and GONZALES

Appellate Military Judges

UNITED STATES, Appellee

v.

Private First Class MARTEZ L. HENDERSON

United States Army, Appellant

ARMY 9501435

1st Armored Division

C. S. Schwender, Military Judge

Counsel

For Appellant: Major Michael E. Hatch, JA (argued) (on brief); Captain Norman R. Zamboni, JA; Major Holly S. G. Coffey, JA (argued); Colonel John T. Phelps II, JA (on Reconsideration).

For Appellee: Captain Thomas N. Auble, JA (argued); Colonel John M. Smith, JA; Lieutenant Colonel Eva M. Novak, JA; Major Virginia G. Beakes, JA (on original brief); Lieutenant Colonel Eva M. Novak, JA; Major Virginia G. Beakes, JA (on supplemental brief); Captain Chris A. Wendelbo, JA (argued); Colonel Joseph E. Ross, JA; Lieutenant Colonel Frederic L. Borch III, JA (on Reconsideration).

30 April 1998

OPINION OF THE COURT ON RECONSIDERATION

Per Curiam:

A general court-martial panel composed of officer and enlisted members found appellant guilty, contrary to his pleas, of the premeditated murder of Thomas Kreiz, a German national; the aggravated assault of the same Mr. Kreiz prior to his death by kicking him in the head with a shod foot, a means likely to produce grievous bodily harm; and the aggravated assault of Mario Massaro, also a German national, by stabbing Mr. Massaro with a knife and thereby intentionally inflicting grievous bodily harm.[1] These offenses constituted violations of Articles 118(l) and 128, UCMJ, 10 U.S.C. §§ 918(l) and 928 (1988). The members sentenced the appellant to be reprimanded, to be reduced to the grade of Private El, to forfeit $300.00 pay per month for fourteen months, to be confined for the length of his natural life, and to be dishonorably discharged from the service. Acting on the advice of his staff judge advocate, the convening authority changed the finding of guilty as to the murder charge (Charge I and its Specification) from premeditated to unpremeditated murder (Article 118(2), UCMJ), approved the remaining findings of guilty, and approved only so much of the adjudged sentence as provided for a dishonorable discharge, confinement for sixty years, forfeiture of $300.00 pay per month for fourteen months, and reduction to Private El.

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[1] The appellant was originally charged with the attempted murder of Mr. Massaro, in violation of Article 80, Uniform Code of Military Justice [hereinafter UCMJ]. The members returned a finding of not guilty of attempted murder, but guilty of the lesser included offense of aggravated assault in violation of Article 128, UCMJ.

We initially reviewed this case pursuant to Article 66, UCMJ, and issued an opinion on 18 November 1997. There, a majority of this court reduced the appellant's homicide conviction from unpremeditated murder to voluntary manslaughter and authorized a rehearing on the sentence. Upon the government's filing of a Petition for Reconsideration and Suggestion for Consideration *En Banc* on 20 January 1998, we vacated our original opinion. *United States v. Henderson*, ARMY 9501435 (Army Ct. Crim. App. 19 February 1998) (order)(unpub.). We also granted the government's request for reconsideration. The Suggestion for Consideration *En Banc* was not adopted by the Court as a whole. Having reconsidered our opinion, we now clarify the facts below in Part 1, and a majority of this court now affirms the findings of guilty and the sentence as approved by the convening authority.

We have, again, considered the record of trial, the single assignment of error, the government's reply thereto, the three issues personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), all supplemental briefs and citations of authority filed by counsel,[2] and the two oral arguments presented by counsel.

[2] On 15 April 1997, this court on its own motion, ordered oral argument on the following issues:

I

WHETHER THE APPELLANT EVER INVOKED HIS RIGHT TO COUNSEL AND, IF SO, WHEN?

II

IF THE ANSWER TO ISSUE I IS IN THE AFFIRMATIVE, WHETHER THE APPELLANT THEREAFTER WAIVED HIS RIGHT TO COUNSEL?

III

WHETHER THE ADMISSIONS OF THE APPELLANT WERE VOLUNTARY AND, THEREFORE, ADMISSIBLE IN HIS COURTMARTIAL?

This court heard oral argument on 4 June 1997 and, on reconsideration, on 11 March 1998.

We have determined that appellant's three *Grostefon* assertions are totally lacking in merit and, therefore, we reject them. Although we reject it also, we feel that it is appropriate to comment on appellant's assignment of error challenging the admissibility of pretrial statements he made to U.S. Army Criminal Investigation Command (CID) agents in which he admitted stabbing the decedent, Mr. Kreiz, but claimed that he did so in self-defense.

I. FACTS[3]

The death of Mr. Kreiz and the wounding of Mr. Massaro resulted from a dispute over a taxicab that occurred at the bahnhof (train station) in Bad Kreuznach, Germany, Fasching[4] night, 23 February 1995. Several hours before midnight on that date, after an afternoon and evening of dining and drinking, Mr. Kreiz and his party of five, composed of himself, his mother, two additional female friends, Ms. Iris Porth and Ms. Annabelle Kurz, and Mr. Massaro, apparently decided not to wait their turn in line at the bahnhof taxicab stand and entered the next taxi that arrived. Appellant, who is black[5], and his party of three, composed of himself, another black soldier named Coleman, and a Caucasian German national named Krakowiki, were among several persons who took issue with Mr. Kreiz's going to the head of the line.

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[3] The testimony introduced at trial, particularly that of the government's seventeen witnesses, is not uniform on several determinative facts. Thus, we have been required to exercise our Article 66(c), UCMJ, factfinding powers extensively in resolving this appeal.

[4] We note that Fasching is the German equivalent of Mardi Gras, a celebration of personal indulgence before the commencement of the observance of the Christian period of self-denial known as Lent.

[5] The race of appellant and the members of his party is relevant only because a number of the eyewitnesses to the melee identified the participants as the "taller black" or "shorter black" or by reference to Mr. Krakowiki's unique braided hair style and the fact that he was wearing a red bandanna. A stipulation of fact established that appellant was three inches shorter than his black associate, Coleman.

Krakowiki verbally protested and physically held the front passenger door of the taxi, preventing Mr. Kreiz from closing it. When Krakowiki assaulted Mr. Kreiz by kicking him once on the thigh, Mr. Kreiz exited the cab and swung his fist at Krakowiki. Krakowiki was not hit, but backed away and ultimately ran towards, and into, Schaefergasse alley.[6] Mr. Kreiz gave chase. His mother and Mr. Massaro yelled at him to "Stop. Leave him alone. Let's go home. It's late." Appellant, Coleman, Mr. Massaro, and Ms. Porth all followed behind at various intervals and in some undetermined order.

However, by the time Mr. Massaro and Ms. Porth arrived at the scene, they saw Mr. Kreiz down on the ground with only appellant standing in very close proximity to him. It was obvious that Mr. Kreiz had been injured. Mr. Massaro got in between appellant and Mr. Kreiz. Unbeknownst to both Ms. Porth and Mr. Massaro, appellant had stabbed/cut Mr. Kreiz eight times, five of which were penetrating wounds.[7] Mr. Massaro and Ms. Porth lifted Mr. Kreiz to his feet, and while supporting him between them, assisted him out of the alley and back to the bahnhof. As they were doing so, they were followed by men who were taunting them. It was at this time that Mr. Massaro was struck in the lower right portion of his back. Although he did not realize at the time that he had been stabbed, this became apparent shortly thereafter. When he was struck, he turned and saw appellant standing about three to six feet behind him, but he never saw a knife. After Mr. Kreiz was dragged/carried back to the front of the bahnhof by his two friends, he collapsed on the ground. While lying on the ground mortally wounded, he was kicked in the head and side by two individuals identified by witnesses as various combinations of appellant, Krakowiki, and Coleman.

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[6]The dispute at the taxi stand between Mr. Kreiz and Krakowiki was substantial enough to cause an unidentified German man to immediately report it to the police located at the bahnhof. However, when the police arrived at the taxi stand, all was calm there because the action by then had moved several hundred meters away into the Schaefergasse alley.

[7]Of these five, one stab to the chest was fatal.

Witnesses to the violent altercation notified the German police at the bahnhof. When the police responded, appellant and his companions fled the scene with the police in pursuit. After a lengthy foot chase, appellant was cornered and apprehended. He was taken into German police custody and transported back to the bahnhof where he was identified by the decedent's mother and Ms. Porth as one of Mr. Kreiz's assailants. He was then taken to the Bad Kreuznach main police station where he was detained for questioning.

After being advised of his rights against self-incrimination under both German law and Article 31, UCMJ,[8] appellant waived those rights and, beginning at about 12:30 a.m. on the morning of 24 February 1995, was interrogated for approximately one and one-half hours by German police. Appellant steadfastly denied any involvement in the incident leading up to the death of Mr. Kreiz. At about 2:00 a.m., appellant indicated that he was tired and asked to continue the interview the next morning. The German police immediately complied with appellant's request and ceased all questioning. The occurrences that are the basis for appellant's sole assignment of error commenced at this time.

Special Agent Ernesto Panaligan, who was present as an observer, asked the head German investigator if he could talk to appellant in private and was permitted to do so. Special Agent Panaligan told appellant that "if he had nothing to do with the murder, he had nothing to worry about" and "that he should just tell the truth." Special Agent Panaligan also stated that he "was a representative of the U.S. Government and was present to help the appellant." Appellant did not respond immediately, but as SA Panaligan was about to leave the room, appellant waved him back into the room and asked about punishments if he were convicted.

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[8] Appellant was advised of his Article 31, UCMJ, rights by Mr. Ernesto Panaligan, the U.S. Army CID special agent (SA) who was on duty that night. Special Agent Panaligan remained as an observer to the German authorities' interrogation.

Special Agent Panaligan answered that punishment was up to the courts. Appellant then admitted that what he had told the German investigators was "not really what happened" and that he "wanted to tell the truth now."

Special Agent Panaligan left the room and returned with his supervisor, CID SA John Kampa. Upon entering the room, SA Kampa said to appellant, "I understand you have something to say." Appellant replied that he did, but that "he needed a lawyer."

Recognizing that appellant had invoked his right to counsel, SA Kampa indicated that he could not talk to appellant if the appellant wanted to talk to a lawyer first and started to leave the room. Appellant motioned him back and asked if he could make a statement at that time and talk to a lawyer "in the morning." Special Agent Kampa initially responded that that could not be done, but when appellant stated, "What? I can't have both?", SA Kampa inquired, "Do you want to talk now and you want a lawyer in the morning?" Appellant responded affirmatively.

Thereafter, in the presence of German police and CID agents, the appellant admitted to stabbing Mr. Kreiz three or four times, purportedly in self-defense, as Mr. Kreiz was beating the appellant.[9] Appellant described his fear of great bodily injury and asserted that he "jabbed" Mr. Kreiz with his pocketknife in the side and back to get Mr. Kreiz to stop pummeling him.[10] This admission by appellant, that he had

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[9] Appellant's admission that he stabbed Mr. Kreiz was substantially the only essential aspect of his statement that was not contradicted by other evidence introduced at trial. For example, *see* footnote 10.

[10] Appellant also stated that he defended himself when Mr. Kreiz knocked him to the ground and struck him repeatedly in the face. According to appellant, when he was able to pull down Mr. Kreiz and roll over on top of him, Mr. Massaro joined in the melee, kicking appellant in the stomach and hitting him in the face. Appellant finally pulled out his pocketknife to defend himself against both Mr. Kreiz and Mr. Massaro. We have found that Mr. Massaro's only role in Schaefergasse alley was to separate appellant from Mr. Kreiz after Mr. Kreiz had been injured by appellant. Consequently, we find the appellant's statement to law enforcement authorities concerning the circumstances surrounding the stabbing to be incredible.

stabbed the decedent in the midst of an affray, was the only direct evidence linking appellant to the stabbing death of Mr. Kreiz. There was circumstantial evidence in the form of the victim's blood on the front of appellant's clothing, however, no witness saw appellant stab Mr. Kreiz, no knife was ever recovered, and the victim's blood was also found on Krakowiki's clothing.

II. VOLUNTARINESS OF THE ADMISSION

The law is clear as to the admissibility of appellant's statement that he stabbed the decedent, assertedly in self-defense. Involuntary pretrial confessions are inadmissible in trials by court-martial. *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992), *cert. denied*, 113 S.Ct. 1813 (1993); Article 31(d), UCMJ; MANUAL FOR COURTS-MARTIAL, UNITED STATES, Mil. R. Evid. 304 (1995). Appellant, who clearly was in police custody, was properly advised of his constitutional and statutory rights against self-incrimination and, at least initially, waived those rights. *Miranda v. Arizona*, 384 U.S. 436 (1966); Article 31(b), UCMJ. When appellant subsequently invoked his right to counsel, questioning ceased until he reinitiated communication, first with SA Panaligan, and subsequently with SA Kampa. *Edwards v. Arizona*, 451 U.S. 477 (1981). Appellant declared his desire to give a statement to the CID agents "now" and to consult with counsel "in the morning," This constituted at the very most an ambiguous reinvocation of his right against self-incrimination. *Davis v. United States*, 512 U.S. 452 (1994). *See also, Connecticut v. Barrett*, 479 U.S. 523 (1987)(police did not violate defendant's rights in continuing to interrogate him when he agreed to extended oral discussion but expressed an unwillingness to give a written statement until his attorney was present). Nothing in the facts of this case supports the conclusion that appellant's will was overborne; his ultimate decision to make a statement claiming self-defense was "an essentially free and unconstrained choice. . . ."

United States v. Bubonics, 45 M.J. 93, 95 (1996). Accordingly, concluding as a matter of law, as we do, that the military judge correctly determined that appellant's statement was voluntary and admissible, we reject appellant's sole assignment of error.

III. SUFFICIENCY OF THE EVIDENCE

Article 66(c), UCMJ, imposes upon this court the duty to determine both the legal and factual sufficiency of each finding of guilty. The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In fulfilling this duty, we find it appropriate to discuss the finding as to the homicide of Thomas Kreiz (Charge 1). Appellant was charged with, and convicted by the court-martial panel of, premeditated murder (Article 118(1), UCMJ). The convening authority disapproved the guilty finding of premeditated murder and substituted a guilty finding of unpremeditated murder (Article 118(2), UCMJ). He did so upon the advice of his staff judge advocate who opined in the addendum to his Rule for Courts-Martial 1106 [hereinafter R.C.M.] recommendation that such action should be accomplished as a matter of clemency.[11] In resolving legal sufficiency, this court is bound to "draw every reasonable inference from the evidence of record in favor of the prosecution," [12] that the evidence establishes beyond a reasonable doubt that: (1) Thomas Kreiz is dead, (2) his death resulted from appellant's act of stabbing him with a knife, (3) the killing was unlawful, and (4) appellant, at the time of the killing, had the intent to kill or inflict great bodily harm.

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[11] It appears that the staff judge advocate's recommendation for clemency was in response to appellant's testimony as a government witness in the trial of his co-accused, Private Coleman.

[12] *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993).

Jackson v. Virginia, 443 U.S. 307, 319 (1979); MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.), Part IV, para. 43b(2) [hereinafter MCM]. The evidence meets this standard. For factual sufficiency, the test is whether, after weighing the evidence of trial and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. UCMJ, art 66(c); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). We have no difficulty concluding that the evidence establishes each of the elements of proof beyond a reasonable doubt. We find that the evidence of record supports the conclusion of the members that the appellant is not entitled to the defense of self-defense. *See* R.C.M. 916(e)(1). Nor was the appellant provoked to such an extent that, in the heat of sudden passion caused by adequate provocation, a fatal blow was struck before self-control could return. *See* MCM, Part IV, para. 44c(l)(a). We also find that any provocation offered by Mr. Kreiz himself was insufficient to excite uncontrollable passion in a reasonable person.

IV. DECISION

Accordingly, the findings of guilty and the sentence are affirmed.

KAPLAN, Judge, concurring in part and dissenting in part:

I am in partial agreement with my fellow judges' recitation of the facts in Part I of the lead opinion, and I concur in their resolution of the issue in Part II concerning the admissibility of appellant's confession that he stabbed the decedent, albeit in claimed self-defense. I must, however, respectfully dissent from their legal conclusion in Part III that the evidence of record is legally and factually sufficient to warrant affirming the guilty finding of unpremeditated murder. I am convinced that a mitigating factor, action in the heat of sudden passion caused by adequate provocation,

existed in this case and that its legal effect is to require us to affirm a guilty finding of voluntary manslaughter rather than unpremeditated murder.

The only direct evidence of appellant's involvement in the death of Mr. Kreiz is that contained in his admission to law enforcement authorities that he stabbed the decedent while both were involved in a violent confrontation, with the decedent beating him about the head and face, and that his sole purpose was to deter the decedent from assaulting him further. The forensic evidence in the case, that is, the location of the wounds on the decedent's left side and back and the presence of significant amounts of the decedent's blood on the right front portion of appellant's clothing, is entirely consistent with appellant's version of the encounter asserting that the decedent was beating appellant at the time that appellant stabbed him.

This court had occasion to address the legal distinction between the offenses of murder and manslaughter in *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973), *aff'd*, 48 C.M.R. 19 (C.M.A. 1973). In that case, this court held that, "Malice is still the proper term for describing that state of mind which distinguishes murder from manslaughter." Id. at 1175. The court went on to explain that,

> [M]urder is the starting point for evaluating the degree of criminality of an intended killing done without justification or excuse. The degree may be reduced to manslaughter given certain circumstances . . . . Fundamentally, unmitigated intent to kill *is* the malice. This is why . . . reduction of intended killing from murder to voluntary manslaughter must be based on objectively adequate provocation. . . . Only after some evidence of adequate provocation is presented is the Government faced with bearing the burden of proof that the more serious offense of murder was committed.

> To be legally adequate, the provocation must be of a quality which would 'excite uncontrollable passion in the mind of a reasonable man.'

Id. at 1176(citing para. 198, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969). (Emphasis in text). These declarations of the black-letter law of homicide, although more than two decades old, remain the controlling precedent on this issue. *See also* MCM, Part IV, para. 44c(l). Whether an unlawful killing constitutes murder or a lesser offense depends upon the circumstances. *Id.* para. 43c(l).

As stated above, the only specific evidence of record concerning the fatal stabbing of Mr. Kreiz is that contained in appellant's admissions to German and American law enforcement authorities. In his statement, appellant maintained that he stabbed the decedent while he and appellant were engaged in a violent physical altercation in which Mr. Kreiz had the upper hand. He further described his fear of great bodily harm. "Heat of passion may be produced by fear as well as rage." *United States v. Bellamy*, 36 C.M.R. 115, 118 (C.M.A. 1966)(citing *United States v. Desroe*, 21 C.M.R. 3 (C.M.A. 1956)); MCM, Part IV, para. 44c(l)(a). Whether appellant's arguably self-serving statement is accepted as true or not, it did constitute "some evidence of adequate provocation" on the part of Mr. Kreiz. Some evidence having thus been presented, the burden then fell upon the Government to disprove the existence of the mitigating factor (action in the heat of sudden passion). *Calley*, 46 C.M.R. at 1175. Government counsel offered no evidence in rebuttal to the appellant's claims. For example, there was no evidence introduced (1) that appellant suffered little or no injury to his facial or head area, or (2) that appellant threatened to kill or injure Mr. Kreiz before striking him, or (3) if Mr. Kreiz did provoke the physical confrontation with appellant, that the provocation was insufficient to excite uncontrollable sudden passion in a reasonable person. Under the set of facts presented in this case, I would find that although the appellant is not entitled to complete exoneration based on his claim of self-defense because he utilized excessive force (a

knife) in resisting the force being applied to his body (with fists), *see United States v. Martinez*, 40 M.J. 426 (C.M.A. 1994), he was acting in the heat of sudden passion caused by adequate provocation.

I reach the conclusion that the mitigating factor existed based on the following facts established by the evidence of record: (1) Mr. Kreiz, the decedent, was aggressive at the taxi stand and continued to be aggressive as evidenced by his chasing Krakowiki and appellant when they attempted to retreat. (2) Mr. Kreiz's actions were substantially provoking, amounting to more than mere insulting language or a push with the flat of the hand; rather, he ran several hundred yards in pursuit of his perceived adversaries, and he did so over the protestations of his mother and his friends. (3) The rapid sequence of events provided no cooling off period between Mr. Kreiz's provocation and appellant's reaction thereto. (4) As stipulated by the government, Mr. Kreiz was physically much larger than appellant - appellant was five feet five inches tall and weighed 117 pounds whereas the decedent was five feet ten inches tall and weighed 154 pounds. (5) As evidenced by the autopsy chemical tests, Mr. Kreiz was significantly intoxicated by alcohol and, perhaps, hashish. (6) Mr. Kreiz had previously been arrested for the crime of assault. (7) The testimony of several witnesses that appellant possessed the character trait of peacefulness. (8) The fact that appellant stabbed Mr. Massaro while Massaro was assisting Mr. Kreiz out of the alley and kicked the decedent later while Mr. Kreiz was lying mortally wounded on the ground in front of the bahnhof, at both of which times appellant was no longer in any danger of physical harm, further indicates appellant's lack of ability to think rationally and to coolly reflect on his actions. Facts (1), (2), (4), (5), (6), and (7) go directly to the issue of adequate provocation. Facts (3), (4), (7) and (8) serve to establish actions based on uncontrollable sudden passion.

Although action in the heat of sudden passion caused by adequate provocation does not excuse a homicide, it does preclude conviction of murder. MCM, Part IV, para. 44c(l)(a).

As a matter of law, a homicide committed in the heat of sudden passion is manslaughter, not murder. *See United States v. Saulsberry*, 43 M.J. 649 (Army Ct. Crim. App. 1995). It is important to keep in mind that the elements of voluntary manslaughter under Article 119(a), UCMJ, are identical to the elements of unpremeditated murder under Article 118(2), UCMJ, the only distinction being the existence, *vel non*, of the mitigating factor of action in the heat of sudden passion. Compare MCM, paras. 43b(2) and 44b(l). "Sudden passion means a degree of rage, pain, or fear which prevents cool reflection." Dep't of Army, Pam. 27-9, MILITARY JUDGES' BENCHBOOK, para. 3-43-ld (30 Sep. 1996).

A claim of self-defense is not always an all-or-nothing proposition. Clearly, under a factual scenario such as exists in this case, manslaughter represents a middle ground between intentional malicious killing (murder) and legally excusable homicide (killing in self-defense). *See Stevenson v. United States*, 162 U.S. 313, 322 (1896). On this point, I must part company with my fellow judges. Applying the law that I believe is controlling in this case, I would affirm only so much of the finding of guilty of the Specification of Charge I as finds that appellant unlawfully killed Thomas Kreiz in the heat of sudden passion caused by adequate provocation in violation of Article 119(a), UCMJ. I would affirm the remaining findings of guilty and order a rehearing on sentence.

FOR THE COURT:

/s/ John T. Rucker
JOHN T. RUCKER
Lieutenant Colonel, JA
Clerk of Court

APPENDIX C

UNITED STATES ARMY COURT
OF CRIMINAL APPEALS

Before

EDWARDS, KAPLAN, and GONZALES

Appellate Military Judges

UNITED STATES, Appellee

v.

Private First Class MARTEZ L. HENDERSON

United States Army, Appellant

ARMY 9501435

1st Armored Division
C. S. Schwender, Military Judge

For Appellant: Major Michael E. Hatch, JA (argued) (on brief); Captain Norman R. Zamboni, JA.

For Appellee: Captain Thomas N. Auble, JA (argued); Colonel John M. Smith, JA; Lieutenant Colonel Eva M. Novak, JA; Major Virginia G. Beakes, JA (on original brief); Lieutenant Colonel Eva M. Novak, JA; Major Virginia G. Beakes, JA (on supplemental brief).

18 November 1997

OPINION OF THE COURT

KAPLAN, Judge:

A general court-martial panel composed of officer and enlisted members found the appellant guilty, contrary to his pleas, of the premeditated murder of Thomas Kreiz, a German national; the aggravated assault of the same Mr. Kreiz by kicking him in the head with a shod foot, a means likely to produce grievous bodily harm; and the aggravated assault of Mario Massaro, also a German national, by stabbing Mr. Massaro with a knife and thereby intentionally inflicting grievous bodily harm.[1] These offenses constituted violations of Articles 118(l) and 128, UCMJ, 10 U.S.C. §§ 918(l) and 928 (1988). The members sentenced the appellant to be reprimanded, to be reduced to the grade of Private El, to forfeit $300.00 pay per month for fourteen months, to be confined for the length of his natural life, and to be dishonorably discharged from the service. Acting on the advice of his staff judge advocate, the convening authority changed the finding of guilty as to the murder charge (Charge I and its Specification) from premeditated to unpremeditated murder (Article 118(2), UCMJ), approved the remaining findings of guilty, and approved only so much of the adjudged sentence as provided for a dishonorable discharge, confinement for sixty years, forfeiture of $300.00 pay per month for fourteen months, and reduction to Private El.

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[1] The appellant was originally charged with the attempted murder of Mr. Massaro, in violation of Article 80, Uniform Code of Military Justice [hereinafter UCMJ]. The members returned a finding of not guilty of attempted murder, but guilty of the lesser included offense of aggravated assault in violation of Article 128, UCMJ.

This case is before the court for automatic review pursuant to Article 66, UCMJ. We have considered the record of trial, the single assignment of error, the government's reply thereto, the three issues personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the supplemental briefs and citations of authority filed by counsel, and the oral arguments presented by counsel.[2] We have determined that appellant's three *Grostefon* assertions are totally lacking in merit and, therefore, we reject them, Although we reject it also, we feel that it is appropriate to comment on appellant's assignment of error challenging the admissibility of pretrial statements he made to U.S. Army Criminal Investigation Command (CID) agents in which he admitted stabbing the decedent, Mr. Kreiz, but claimed that he did so in self-defense. Finally, in the exercise of our Article 66, UCMJ, responsibilities, we have reviewed and found insufficient the evidence supporting the finding of guilty of unpremeditated murder. We will order appropriate relief to correct this error.

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[2]On 15 April 1997, this court on its own motion ordered oral argument on the following issues:

I

WHETHER THE APPELLANT EVER INVOKED HIS RIGHT TO COUNSEL AND, IF SO, WHEN?

II

IF THE ANSWER TO ISSUE I IS IN THE AFFIRMATIVE, WHETHER THE APPELLANT THEREAFTER WAIVED HIS RIGHT TO COUNSEL?

III

WHETHER THE ADMISSIONS OF THE APPELLANT WERE VOLUNTARY AND, THEREFORE, ADMISSIBLE IN HIS COURT-MARTIAL?

I. FACTS

The death of Mr. Kreiz and the wounding of Mr. Massaro resulted from a dispute over a taxicab that occurred at the bahnhof (train station) in Bad Kreuznach, Germany, Fasching[3] night, 23 February 1995. Near midnight on that date, after an evening of dining and drinking, Mr. Kreiz and his party, composed of his mother, his girlfriend, Ms. Iris Porth, and Mr. Massaro, apparently decided not to wait their turn in line at the bahnhof taxicab stand and attempted to get into the next taxi that arrived at the stand. A verbal dispute ensued, which soon turned physically violent. The appellant, who is black[4], and his party, composed of another black soldier named Coleman and a black German national named Krakowiki, were among several persons who took issue with Mr. Kreiz's attempt to push to the head of the line.

After scuffling with a German businessman briefly, Mr. Kreiz focused his attention on the appellant. When the appellant backed away and ultimately ran away, Mr. Kreiz gave chase with Krakowiki, Coleman, Massaro, and Ms. Porth following behind at various intervals and in some undetermined order. They ran several hundred yards away from the taxi stand and into an alley. When Ms. Porth ertered the alley, she saw the decedent on the ground with several black males around him. He was obviously injured, so she and Mr. Massaro pulled him to his feet, supported him between them, and assisted him out of the alley and back to the bahnhof. As they were doing so, they were followed by the group of young black men who were taunting them; it was at this time that Mr. Massaro was struck in the lower right portion of his back. Although he did not realize at the time that he had been stabbed, this became apparent shortly

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[3] We note that Fasching is the German equivalent of Mardi Gras, a celebration of personal indulgence before the commencement of the observance of the Christian period of self-denial known as Lent.

[4] The race of the appellant and the members of his party is relevant only because a number of the eyewitnesses to the melee identified the participants by the color of their skin or their hair.

thereafter. When he was struck, he turned and saw the appellant standing about three to six feet behind him, but he never saw a knife. After he was dragged/carried back to the front of the bahnhof by his friends, Mr. Kreiz collapsed on the ground. While lying on the ground mortally wounded[5], he was kicked in the head and side by two black males variously identified by witnesses as the appellant, Krakowiki, or Coleman.

Witnesses to the violent altercation notified the German police who had an office in the bahnhof. When the police responded, the appellant and his companions fled the scene with the police in pursuit. After a lengthy foot chase, the appellant was cornered and apprehended. He was taken into German police custody and transported back to the bahnhof where he was identified by the decedent's mother and Ms. Porth as one of Mr. Kreiz's assailants. He was then taken to the Bad Kreuznach main police station where he was detained for questioning.

After being advised of his rights against self-incrimination under both German law and Article 31, UCMJ,[6] the appellant waived those rights and, beginning at about 12:30 a.m. on the morning of 24 February 1995, was interrogated for approximately one and one-half hours by German police. Appellant steadfastly denied any involvement in the incident leading up to the death of Mr. Kreiz. At about 2:00 a.m., the appellant indicated that he was tired and asked to continue the interview the next morning. The German police immediately complied with the appellant's request and ceased all questioning. The occurrences that are the basis for the appellant's sole assignment of error commenced at this time.

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[5]An autopsy revealed that Mr. Kreiz had been stabbed nine times. Two of his wounds were categorized as potentially fatal.

[6]The appellant was advised of his Article 31, UCMJ, rights by Mr. Ernesto Panaligan, the U.S. Army CID special agent (SA) who was on duty that night. Special Agent Panaligan remained as an observer to the German interrogation.

Special Agent Ernesto Panaligan, who was present as an observer, asked the head German investigator if he could talk to the appellant in private and was permitted to do so. Special Agent Panaligan told the appellant that "if he had nothing to do with the murder, he had nothing to worry about" and "that he should just tell the truth." Special Agent Panaligan also stated that he "was a representative of the U.S. Government and was present to help the appellant." Appellant did not respond immediately, but as SA Panaligan was about to leave the room, the appellant waved him back into the room and asked about punishments if he were convicted. Special Agent Panaligan answered that punishment was up to the courts. The appellant then admitted that what he had told the German investigators was "not really what happened" and that he "wanted to tell the truth now."

Special Agent Panaligan left the room and returned with his supervisor, CID SA John Kampa. Upon entering the room, SA Kampa said to the appellant, "I understand you have something to say." Appellant replied that he did, but that "he needed a lawyer." Recognizing that appellant had invoked his right to counsel, SA Kampa indicated that he could not talk to the appellant if the appellant wanted to talk to a lawyer first and started to leave the room. The appellant motioned him back and asked if he could make a statement at that time and talk to a lawyer "in the morning." Special Agent Kampa initially responded that that could not be done, but when the appellant stated, "What? I can't have both?", SA Kampa inquired, "Do you want to talk now and you want a lawyer in the morning?" The appellant responded affirmatively.

Thereafter, in the presence of German police and CID agents, the appellant admitted to stabbing Mr. Kreiz three or four times, purportedly in self-defense, as Mr. Kreiz was beating the appellant. The appellant contended that he was in fear of injury and "jabbed" Mr. Kreiz with his

pocketknife in the side and back to get Mr. Kreiz to stop pummeling him.[7] This admission by the appellant, that he had stabbed the decedent in the midst of an affray, was the only direct evidence linking the appellant to the death of Mr. Kreiz. There was some circumstantial evidence in the form of the victim's blood on the front of the appellant's clothing, however, no knife was ever recovered, and the victim's blood was also found on Krakowiki's clothing.

II. VOLUNTARINESS OF THE ADMISSION

The law is clear as to the admissibility of the appellant's statement that he stabbed the decedent, assertedly in self-defense. Involuntary pretrial confessions are inadmissible in trials by court-martial. *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992), *cert. denied*, 113 S.Ct. 1813 (1993); Article 31(d), UCMJ; Military Rule of Evidence 304. The appellant, who clearly was in police custody, was properly advised of his constitutional and statutory rights against self-incrimination and, at least initially, waived those rights. *Miranda v. Arizona*, 384 U.S. 436 (1966); Article 31(b), UCMJ. When the appellant subsequently invoked his right to counsel, questioning ceased until he reinitiated communication, first with SA Panaligan, and subsequently with SA Kampa. *Edwards v. Arizona*, 451 U.S. 477 (1981). The appellant declared his desire to give a statement to the CID agents "now" and to consult with counsel "in the morning." This constituted at the very most an ambiguous reinvocation of his right against self-incrimination. *Davis v. United States*, 512 U.S. 452 (1994). *See also, Connecticut v. Barrett*, 479 U.S. 523 (1987) (police did not violate defendant's rights in continuing to interrogate him when he agreed to

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[7]The appellant also stated that Mr. Kreiz had knocked him to the ground and struck him repeatedly in the face, that he had been able to roll over on top of Mr. Kreiz, that Mr. Massaro had then joined in the melee kicking appellant in the stomach and hitting him in the face, and that he finally pulled out his pocket knife to defend himself against multiple assailants.

extended oral discussion but expressed an unwillingness to give a written statement until his attorney was present). Nothing in the facts of this case supports the conclusion that the appellant's will was overborne; his ultimate decision to make a statement claiming self-defense was "an essentially free and unconstrained choice. . . . ." *United States v. Bubonics*, 45 M.J. 93, 95 (1996). Accordingly, concluding as a matter of law, as we do, that the military judge correctly determined that the appellant's statement was voluntary and admissible, we reject the appellant's sole assignment of error.

III. SUFFICIENCY OF THE EVIDENCE

Article 66(c), UCMJ, 10 U.S.C. § 866(c), imposes upon this court the duty to determine both the legal and factual sufficiency of each finding of guilty. The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In fulfilling this duty, we have found it necessary to scrutinize the finding as to the homicide of Thomas Kreiz (Charge 1). The appellant was charged with, and convicted by the court-martial panel of, premeditated murder (Article 118(1), UCMJ). The convening authority disapproved the guilty finding of premeditated murder and substituted a guilty finding of unpremeditated murder (Article 118(2), UCMJ). He did so upon the advice of his staff judge advocate who opined in the addendum to his Rule for Courts-Martial 1106 recommendation that such action should be accomplished as a matter of clemency.[8] In order to affirm a finding of guilty of unpremeditated murder, we must be

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[8] It appears that the staff judge advocate's recommendation for clemency was in response to the appellant's testimony as a government witness in the trial of his co-accused, Private Coleman.

convinced, "drawing every reasonable inference from the evidence of record in favor of the prosecution,"[9] that the evidence establishes that: (1) Thomas Kreiz is dead, (2) his death resulted from the appellant's act of stabbing him with a knife, (3) the killing was unlawful, and (4) the appellant, at the time of the killing, had the intent to kill or inflict great bodily harm. Manual for Courts-Martial, United States (1995 edition), Part IV, para. 43b(2) [hereinafter MCM, 1995]. We have no difficulty concluding that the evidence establishes each of these elements,[10] but additional evidence of a possible mitigating circumstance calls for further analysis.

The only direct evidence of the appellant's involvement in the death of Mr. Kreiz is that contained in his admission to law enforcement authorities that he stabbed the decedent while both were involved in a violent confrontation, with the decedent beating him about the head and face, and that his sole purpose was to deter the decedent from assaulting him. The forensic evidence in the case, that is, the location of the wounds on the decedent's left side and back and the presence of significant amounts of the decedent's blood on the right front portion of the appellant's clothing, is entirely consistent with the appellant's version of the encounter asserting that the decedent was sitting on top of the appellant at the time that appellant stabbed him.

This court had occasion to address the legal distinction between the offenses of murder and manslaughter in the notorious My Lai massacre case, *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973), *aff'd*, 48 C.M.R. 19 (C.M.A. 1973). In that case, we held that, "Malice is still the proper term for describing that state of mind which distinguishes murder from manslaughter." *Id.* at 1175. We went on to explain that,

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[9] *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993).

[10] The evidence of record supports the conclusion of the members that the appellant is not entitled to the defense of self-defense. *See* Rule for Courts-Martial 916(e)(1); MCM, 1995.

> [M]urder is the starting point for evaluating the degree of criminality of an intended killing done without justification or excuse. The degree may be reduced to manslaughter given certain circumstances. . . . Fundamentally, unmitigated intent to kill *is* the malice. This is why . . . reduction of intended killing from murder to voluntary manslaughter must be based on objectively adequate provocation. . . . Only after some evidence of adequate provocation is presented is the Government faced with bearing the burden of proof that the more serious offense of murder was committed.
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> . . . .
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> To be legally adequate, the provocation must be of a quality which would 'excite uncontrollable passion in the mind of a reasonable man.'

Id. at 1176, citing para. 198, Manual for Courts-Martial, United States, 1969. [Emphasis in text]. These declarations of the black-letter law of homicide, although more than two decades old, remain the controlling precedent on this issue. *See also* MCM, 1995, Part IV, para. 44c(l).

As stated above, the only specific evidence of record concerning the fatal stabbing of Mr. Kreiz is that contained in the appellant's admissions to German and American law enforcement authorities. In his statement, appellant maintained that he stabbed the decedent while he and the appellant were engaged in a violent physical altercation in which Mr. Kreiz had the upper hand. He further asserted that he did so because he was in fear of great harm. Some evidence of adequate provocation having thus been presented, the burden then fell upon the Government to disprove the existence of the mitigating factor (action in the heat of sudden passion). *Calley*, 46 C.M.R. at 1175. Government counsel offered no evidence in rebuttal to the appellant's claims. Under the set of facts presented in this

case, we find that although the appellant is not entitled to exoneration based on his claim of self-defense because he utilized excessive force (a knife) in resisting the force being applied to his body (with fists), he was acting in the heat of sudden passion caused by adequate provocation.[11] Although action in the heat of sudden passion caused by adequate provocation does not excuse a homicide, it does preclude conviction of murder. MCM, 1995, Part IV, para. 44c(l)(a). As a matter of law, a homicide committed in the heat of sudden passion is manslaughter, not murder.[12] *See United States v. Saulsberry*, 43 M.J. 649 (Army Ct. Crim. App. 1995). A claim of self-defense is not always an all-or-nothing proposition. Clearly, under a factual scenario such as exists here, manslaughter represents a middle ground between intentional malicious killing (murder) and legally excusable homicide (killing in self-defense). *See Stevenson v. United States*, 162 U.S. 313, 322 (1896). We will correct the findings accordingly.

IV. SENTENCE REDETERMINATION

As noted above, the findings of guilty as approved by the convening authority included unpremeditated murder and two specifications of aggravated assault (one with intentional infliction of grievous bodily harm and one with a

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[11]Our conclusion is based, in part, on the following facts: (1) Mr. Kreiz was aggressive at the taxi stand where he assaulted a German businessman and continued to be aggressive as evidenced by his chasing the appellant when the appellant retreated, (2) Mr. Kreiz was physically larger than the appellant, (3) Mr. Kreiz was significantly intoxicated, and (4) Mr. Kreiz sustained a total of nine wounds, seven of which were shallow and non-life threatening.

[12]The elements of voluntary manslaughter, Article 119(a), UCMJ, are identical to the elements of unpremeditated murder, the only distinction being the presence of the mitigating factor of action in the heat of sudden passion. Compare MCM, 1995, paras. 43b(2) and 44b(l). For a discussion of "sudden passion" and "adequate provocation" *see* MCM, 1995, para. 44c(l)(b).

means or force likely to inflict grievous bodily harm). The maximum imposable sentence to confinement for these offenses is life imprisonment. The sentence, as approved by the convening authority, includes confinement for sixty years. Our determination that the evidence of record supports a guilty finding of the lesser included offense of voluntary manslaughter rather than the greater offense of unpremeditated murder has the effect of reducing the maximum confinement sentence to twenty-three years. Considering this reduction in the maximum permissible confinement by nearly two-thirds, we have determined that we cannot reasonably ascertain the sentence that would have resulted in the absence of this error. Rather, we must order a sentence rehearing at the trial level. *United States v. Sales*, 22 M.J. 305, 307 n.3 (C.M.A. 1986).

V. DECISION

Accordingly, the court affirms only so much of the finding of guilty of the Specification of Charge I as finds that the appellant unlawfully killed Thomas Kreiz in the heat of sudden passion caused by adequate provocation, in violation of Article 119(a), UCMJ. The remaining findings of guilty are affirmed. The sentence is set aside. A rehearing on the sentence may be ordered by the same or a different convening authority.

Judge GONZALES concurs.

EDWARDS, Senior Judge, concurring in part and dissenting in part:

I agree with the majority's resolution of the appellant's assignment of error. I disagree with their findings that the appellant killed "in the heat of sudden passion."

In my opinion, the appellant's claim of self-defense fell short of its intended mark, and the approved finding of guilty of unpremeditated murder is correct in both law and fact.

Jackson v. Virginia, 443 U.S. 307 (1979); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987); Art. 66(c), UCMJ. I find no legal or factual basis that gives rise to "the mitigation" of acting in the heat of sudden passion. Simply put, in applying the tests for legal and factual sufficiency, we all agree that legally and factually all of the elements of unpremeditated murder were met. We all agree that the appellant was not acting in self-defense. We part company in finding "mitigation" concerning the killing. I would affirm all the findings of guilty and the sentence as approved by the convening authority.

FOR THE COURT:

/s/ John T. Rucker

JOHN T. RUCKER
Lieutenant Colonel, JA
Clerk of Court

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee

v.

Martez L. HENDERSON, (376-80-4369), Appellant

USCA Dkt. No. 98-0847

Crim. App. Dkt. No. 9501435

JUDGMENT

This cause came before the Court on appeal from the United States Army Court of Criminal Appeals and was argued by counsel on May 12, 1999. On consideration thereof, it is by the Court, this 27th day of September, 1999,

ORDERED and ADJUDGED:

That the decision of the United States Army Court of Criminal Appeals is affirmed in accordance with the opinion filed herein this date.

For the Court,

/s/ Thomas F. Granahan
Clerk of the Court